11, 1921, No. 99, an action was commenced by attachment in Delaware against a non-resident. The defendant attempted to appear, but was refused the right to do so unless he put in special bail to the amount of the value of the property held under the attachment. This was the statutory rule in Delaware, and the defendant, who was unable to put in the special bail, attacked the rule as operating to deprive him of property without due process of law.

It appeared that this harsh rule was derived from the Custom of London in foreign attachment, and had been brought over to America by the colonists, and that in Delaware it could show statutory continuity down to the present time. The court cites a number of cases from other seaboard states where the Custom of London also obtained a foothold, but an investigation of the statutory history of the rule in those states seems to indicate that in every one of them the rule long since succumbed to the progress of enlightened civilization and passed over the Styx into the shadowy land of legal tradition where the ghosts of ancient laws wander restlessly forever. Sodom was thought worthy of being saved if but ten righteous men could be found there, and it is possible that our constitution should be equally charitable toward any medieval custom which could show the endorsement of even a single modern jurisdiction. But the court took a rather cheerless view of the purpose of the constitution, saying that, "However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform." This sounds like the exclusion from the purview of the constitution of practically all cases of outgrown processes, and would probably justify the current use of trial by battle. But the court may not have intended to take such broad ground against rising standards of justice. Its decision is probably correct, but its reasons seem to accord too high a degree of respectability to the lingering relics of a ruder age. E. R. S.

PROFITS FROM SALE OF CAPITAL ASSETS AS INCOME: TAXABLE UNDER SIXTEENTH AMENDMENT.—The Supreme Court of the United States has taken another step in clearing up the legal concept of income. In four cases, decided March 28, 1921, the troublesome problem of whether or not profits arising from the sale of capital assets shall be considered as income for the purposes of the Income Tax was settled. These cases all arose under the Income Tax act of 1916, as amended in 1917, 39 Stat., ch. 463, p. 756, 40 Stat., ch. 63, p. 300, and were all suits to recover taxes assessed, and paid under protest. All involved the question of the constitutionality of the assessment under the 16th Amendment, the contention of the taxpayer in each case being that the fund taxed was not "income" within the meaning of the Amendment. In *Merchants' Loan & Trust Co.* v. *Smietanka*, the plaintiff was trustee under a will of property, the net income of which was to be paid to the testator's widow for life, and after her death, to the children until each

should become twenty-five years of age, when each was to receive his share of the trust fund. Stock dividends and accretions of selling values, under the will, were to be considered as principal, and not income, and the trustee was given full dominion over the estate. Certain stock, worth $561,798 on March 1, 1913, the effective date of the Amendment, was sold in 1917 for $1,280,996.64, and the difference was taxed as income. The Supreme Court held that it was taxable, although it was not in a course of dealing with stocks, but a mere isolated sale. In *Eldorado Coal Co.* v. *Mager,* the plaintiff corporation sold its plant for cash in 1917, distributing the cash among the stockholders, the corporation not being dissolved, because of unsettled liabilities outstanding. Adding to the market value of March 1, 1913, the cost of additions, and subtracting the depreciation, the appreciation in value after that date was some $6,000, on which assessment was made, and the tax paid. It was held that this was taxable, as in *Merchant's Loan & Trust Co.* v. *Smietanka.* In *Goodrich* v. *Edwards,* the plaintiff bought stock in 1912 for $500, which was worth $695 on March 1, 1913, and sold it in 1916 for $13,-931.22. He was taxed on the difference between the value on March 1, 1913, and the selling price, and the Court sustained the tax. He also exchanged stock in 1912 for other stock then worth $291,600. On March 1, 1913, it had gone down to $148,000 and he sold it in 1916 for $269,000. He was taxed on the difference between the value of March 1, 1913, and the selling value, but the Court held that the Income Tax covered only actual gains, and here was a loss. In *Walsh* v. *Brewster,* the plaintiff, who occasionally bought and sold stocks to change his investments, bought some stock in 1909 which fell in value by March 1, 1913. He sold it for what he paid for it, and the Court held that there having been no actual gain, there was nothing to tax. He also had bought some stock in 1902 for $231,300, the value of which on March 1, 1913, was $164,480, and sold it in 1916 for $276,150. He was taxed on the difference between the value on March 1, 1913, and the selling price. The lower court held that it was, in any event, a conversion of capital assets, and not taxable income, but the Supreme Court held that the actual gain to the seller was income; i. e., the difference, here, between the purchase price and selling price.

The Court in these cases followed its own *dictum* in *Eisner* v. *Macomber,* 252 U. S. 189, 207, where it gave a definition of income, saying "Income may be defined as a gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through sale or conversion of capital assets." That profit from the sale of capital assets was taxable as income was specifically held under the corporation excise tax of 1909. *Hays* v. *Gauley Mountain Coal Co.,* 247 U. S. 189. The Court felt bound by the interpretation of income given in the cases under the excise tax, although it is arguable that the word "income" might have a broader meaning under a corporation excise tax than under an income tax calculated to apply to private individuals as well as to corporations. As Justice Holmes says in *Towne* v. *Eisner,* 245 U. S. 418, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in

color and content according to the circumstances and the time in which it is used." It seems clear that the Court would decide that what was income for the tax-collector is not income for a life tenant under a trust. See *Jordan* v. *Jordan,* 192 Mass. 337; *Thayer* v. *Burr,* 201 N. Y. 155; and see *Tax Commissioner* v. *Putnam,* 227 Mass. 522, at page 529.

Gray v. *Darlington,* 15 Wall. 63, was a case which came up under the income tax of 1867. The act provided for levying annually a tax on gains, profits and income for the year derived from any source, and provided that in estimating the gains and profits, there should be included gains realized within the year preceding the collection of the tax. The plaintiff exchanged some notes for United States bonds in 1865, and sold them in 1869, at a profit, and paid the tax on this profit, under protest. He was allowed to recover the amount paid, because the increase in value developed over a series of years, and so, according to the Act, could not be considered as income for any one year. According to the terms of that Act, it was perhaps, not necessary to decide that increase of capital assets, converted into cash, was not income, but the court in that case, nevertheless, took the view that such conversion could not be considered as income. The lower court, in *Walsh* v. *Brewster,—Brewster* v. *Walsh,* 268 Fed. 207—took the view that the meaning of income in the 16th Amendment was no broader than in the Act of 1867. Similarity in wording would indicate that Congress at least had that act in mind.

Pollock v. *Farmers' Loan and Trust Co.,* 158 U. S. 601, decided that taxes on income from real or personal property were direct taxes; as being in reality the same as a tax on the source itself. Other sorts of income, such as salaries, were considered to be subject only to an excise tax, to which the rule of uniformity applies. The 16th Amendment did not give Congress power to lay any new kind of tax, but simply removed the necessity of apportionment, and considering the source from which income is derived. Uniformity is still necessary, where applicable. *Brushaber* v. *Union Pacific Rd. Co.,* 240 U. S. 1, 17-19. In *Towne* v. *Eisner,* 245 U. S. 418, Justice Holmes gave the opinion of the court, holding that under the 16th Amendment "stock dividends" were not taxable as income, since the shareholder continued to have the same interest in the capital assets of the corporation that he had before. In *Eisner* v. *Macomber,* 252, U. S. 189, under an act of Congress making stock dividends taxable, it was held that they could not be considered as income, the court saying that Congress cannot by any definition it may adopt conclude the matter, since it cannot alter the Constitution. The court said that it was essential to distinguish between what is and what is not income, as the term is used in the 16th Amendment, and apply the distinction with regard to substance, and not form. Justice Holmes dissented here, reiterating that, soundly considered, stock dividends were not income, but said that the 16th Amendment was broad enough to cover it, so that it could be made income under the Amendment. Hence, the problem, according to the court, is simply to ascertain just what the term "income" legally defined can include.

It was decided in *Lynch* v. *Turrish,* 247 U. S. 221, that where a corporation sells out to another corporation, and distributes the proceeds among stockholders, if the value on the effective date of the Amendment, is the same as the value when liquidated, after the date, there is no taxable income, even though the stockholders get double the value of their stock. On the other hand, in *Lynch* v. *Hornby,* 247 U. S. 339, where the corporation declared a dividend on surplus earnings, all of which had accrued before March 1, 1913, the dividend declared after that date was taxable, even though made up of capital assets, for the dividends were, to the individual, a tangible return on his stock. And if this dividend were made up partly of stock in another corporation, under the same circumstances, it is taxable; *Peabody* v. *Eisner,* 247 U. S. 347. See *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330, 335, where it was assumed that the meaning of "income" was the same as in the corporation tax of 1909.

Had there been no corporation excise tax, it seems doubtful if the Supreme Court would have included this liquidated increment of value in capital assets under income. That it may be desirable to tax it as income, so as to save it from the necessity of apportionment, is, of course, of no interest to the court. And there can be no problem of double taxation, if one pays taxes on dividends, and then again pays taxes on profits from the sale of the same stock, perhaps increased in value simply because it regularly paid dividends. The court simply wants to find what is income in the commonly accepted meaning of that term; yet what is commonly accepted as income is itself a well-nigh impossible thing to define. Although the court must find an act constitutional if by any reasonable meaning given to it, it can, yet in the very nature of the problem, it must differentiate clearly between what is and what is not income.

The court dealt in a high-handed manner with *Gray* v. *Darlington,* in distinguishing it. The distinction made in *Hays* v. *Gauley Mountain Coal Co.* was followed, where it was said that the Act of 1867 did not apply to such sales of stock unless the whole transaction was made within the year in which the tax was sought to be collected; but the two Acts are much alike, save that in the Act of 1916, the tax is levied on income "received" in the year, while in the Act of 1867, it is on income "derived." Inasmuch as there can be no income at all until the act of conversion, it would seem that it is both "derived" and "received" at that time, so the Acts can hardly be distinguished on that ground. In the *Darlington* case, the court let in profits from sales in the course of trade and commerce, although the transactions did not begin and end during the year, but did not let in a sale from an isolated transaction. It would seem that it considered that such profit was not income, and so the court in the principal cases is virtually overruling *Gray* v. *Darlington,* in calling such profit "income." It hardly seems that the Act of 1916 is different enough in its wording from the Act of 1867 to warrant saying that Congress has made that income which was not income under the former Act, in accordance with the reasoning of Justice Holmes in his dis-

senting opinion in *Eisner* v. *Macomber, supra,* so as to drag it in under the Sixteenth Amendment. It seems, rather, that the Supreme Court has, in a doubtful situation, redefined income, and has thus made a distinct advance in the legal interpretation of the term. If the law as it stands works unjustly, it is up to Congress to change it. G. D. C.

NEGLIGENCE OF DRIVER NOT IMPUTED TO GUEST.—With the decision of the Wisconsin court in *Reiter* v. *Grober, et al.,* (Wis., 1921), 181 N. W. 739, there fell the last stronghold of the doctrine which imputed the negligence of the driver of a vehicle to a guest riding with him. The first American state to adopt the doctrine first enunciated in *Thorogood* v. *Bryan,* 8 C. B. 115, was the last to throw it overboard.

To impute the negligence of one person to another the relation between them must be one invoking the principles of agency, or the parties must be co-operating in a common or joint enterprise, or the relation between the parties must have been such that the person to whom the negligence is imputed must have had the legal right to control the action of the person actually negligent. I SHEARMAN & REDFIELD, LAW OF NEGLIGENCE, [6th Ed.], Sec. 65a, et seq.

In *Thorogood* v. *Bryan* (*supra*), an English court first held that a passenger in a public vehicle, though having no control over the driver, must be held to be so identified with the vehicle as to be chargeable with any negligence on the part of the driver which contributed to an injury inflicted upon such passenger by the negligence of a third party. This was but an attempted extended application of the old Roman doctrine of identification, and has been practically unanimously refused and denied in the United States. *Little* v. *Hackett,* 116 U. S. 366, 29 L. Ed. 652. In England, too, it was early recognized that the *Thorogood* decision rested "upon reasons inconclusive and unsatisfactory" and the case was over-ruled in *The Bernina,* 12 Prob. Div. 58, 13 App. Cas. 1.

While the doctrine was thus met with opposition upon all sides when applied to public conveyances, a remnant of it remained, when the Wisconsin court in *Houfe* v. *Fulton,* 29 Wis. 296, 9 Am. Rep. 568, and in *Priedeaux* v. *Mineral Point,* 43 Wis. 513, 28 Am. Rep. 558, adopted it in the case of passengers riding in *private* vehicles. This new theory, attacked when first enunciated and since as "resting upon no sound legal basis either as to agency or identity", *Reiter* v. *Grober* (*supra*), was repudiated by most courts, yet followed for a time in Montana and Nebraska. *Whittaker* v. *Helena,* 14 Mont. 124, 35 Pac. 904; *Omaha, etc., R. Co.* v. *Talbot,* 48 Neb. 627, 67 N. W. 569. But Montana repudiated the doctrine in 1908 in *Sherris* v. *Northern Pac. R. Co.,* 55 Mont. 189, 175 Pac. 269, and Nebraska dropped even earlier in *Loso* v. *Lancaster County,* 77 Neb. 466, where the court pointed out that the doctrine of imputed negligence cannot be logically applied unless there is some privity between driver and guest. Wisconsin stood by the principle for which it had become sponsor for more than fifty years, following the